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# DISEASE AS INDUSTRIAL INJURY IN CALIFORNIA

Charles Lawrence Swezey\*

The English Workmen's Compensation Act of 1906 specified that a compensable harm must be either a physical injury by accident or one of six listed industrial diseases.<sup>1</sup> Most of the early statutes in the United States were limited expressly or by judicial interpretation to accidental injury.<sup>2</sup> Eventually coverage in all but three states was extended to encompass occupational diseases. Some jurisdictions, in the manner of the English act, schedule the specific occupational diseases and frequently the industry covered. Nearly thirty now provide for general coverage.<sup>3</sup>

California's first compulsory workmen's compensation act, enacted in 1913, allowed compensation only where an employee sustained a personal injury by accident. Because the phrase "by accident" was thought to exclude occupational diseases, the law was amended in 1915 to eliminate these words and to provide for compensation for any injury arising out of and in the course of the employment. The purpose of this amendment was to extend liability coverage to diseases as well as traumatic injuries arising out of the employment.<sup>4</sup>

Two years later California became one of the first jurisdictions to expressly cover disease in general terms when the Workmen's Compensation Insurance and Safety Act of 1917 defined injury to include "any disease arising out of the employment."<sup>5</sup> This definition now appears in Section 3208 of the California Labor Code. Disease is also mentioned in three other Labor Code sections: Section 4663, which provides that in the case of aggravation of a pre-existing disease compensation is recoverable only for the portion of the disability attributable to the aggravation; Section 5412, which defines the date of injury in occupational disease cases; and Section

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<sup>1</sup> 6 Edw. 7, ch. 58, Schedule III.

<sup>2</sup> Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents*, 42 CALIF. L. REV. 531, 541 (1954).

<sup>3</sup> 1 LARSON, WORKMEN'S COMPENSATION 593 (1961).

<sup>4</sup> *Slattery v. City and County of San Francisco*, 6 I.A.C. 140 (1919).

<sup>5</sup> Cal. Stat. 1917, ch. 586, § 3(4).

5500.5, which sets forth the procedure for the trial of a claim for occupational disease arising out of more than one employment.

Since Labor Code Section 3208 places injury and disease in the disjunctive, it is reasonable to assume that the word disease is not intended to include traumatic disturbances of bodily health. The Labor Code, however, contains no definition of disease. The word is commonly defined as "any illness or departure from health" or, more specifically, "a particular destructive process in the body with a specific cause and characteristic symptoms."<sup>6</sup> A physician would probably say that a disease is a "definite morbid process having a characteristic train of symptoms which may affect the whole body or any of its parts and the etiology, pathology and prognosis of which may be known or unknown."<sup>7</sup>

California compensation decisions use the term disease in at least six different contexts: (1) occupational disease; (2) other disease arising out of employment; (3) aggravation of pre-existing disease by employment conditions; (4) aggravation of pre-existing disease by a specific incident of trauma; (5) disease as a proximate result of traumatic injury; (6) injury caused by disease.

In each of the six categories the ultimate result under California law is an award of compensation if the requisite facts are established. The theory and factual requirements may, however, vary depending upon how the disease contributes to the disability for which compensation is claimed.

Exploration of the six types of cases reveals similarities from which basic principles can be drawn and facilitates consideration of certain special problems, which are not ordinarily encountered in an uncomplicated traumatic injury case, such as apportionment and ascertainment of the date of injury.

### OCCUPATIONAL DISEASES

An appellate judge recently observed that "the term 'occupational disease' has not been defined either by the code or by authoritative judicial decision."<sup>8</sup> The same decision, however, cited *Johnson v. Industrial Accident Commission*<sup>9</sup> which described an occupational disease as one in which the cumulative effect of exposure in the employment environment ultimately results in manifest pathology and which is "a natural incident of a particular occupation as dis-

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<sup>6</sup> WEBSTER, NEW 20TH CENTURY DICTIONARY (3d ed. 1966).

<sup>7</sup> DORLAND, ILLUSTRATED MEDICAL DICTIONARY (23d ed.).

<sup>8</sup> *Turudich v. I.A.C.*, 237 Cal. App. 2d 455, 47 Cal. Rptr. 21, 30 C.C.C. 316 (1965).

<sup>9</sup> 157 Cal. App. 2d 838, 321 P.2d 856, 23 C.C.C. 54 (1958).

tinguished from and exceeding the hazard and risk of ordinary employment."

Since disease arising out of the employment has nearly always been compensable in California regardless of whether it is "occupational" or caused "by accident," the California courts have not had cause to belabor definitions of occupational disease to the extent other states have done so.<sup>10</sup> The California courts have, however, recognized from the outset that diseases arising out of employment fall into two classes: (1) industrial or occupational disease which is the natural and expected result of a workman following a particular occupation for a considerable period of time, and (2) other disease which is the result of some unusual condition of the employment.<sup>11</sup>

Silicosis,<sup>12</sup> wheat allergy,<sup>13</sup> glass blowers' arm,<sup>14</sup> and lead poisoning<sup>15</sup> have been treated as occupational diseases by appellate courts. Cancer caused by a blow,<sup>16</sup> poliomyelitis from a single exposure<sup>17</sup> and an injury to the back as the result of using a jackhammer on a specific date<sup>18</sup> have been held not to be occupational diseases. The Industrial Accident Commission<sup>19</sup> has considered asbestosis,<sup>20</sup> emphysema superimposed upon silicosis,<sup>21</sup> lead poisoning,<sup>22</sup> encephalitis lethargica,<sup>23</sup> dermatitis,<sup>24</sup> undulant fever or bru-

<sup>10</sup> Cf., 1 LARSON, WORKMEN'S COMPENSATION 593 (1961).

<sup>11</sup> San Francisco v. I.A.C., 183 Cal. 273, 191 Pac. 26, 7 I.A.C. 108 (1920); Marsh v. I.A.C., 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 159, 163 (1933).

<sup>12</sup> Marsh v. I.A.C., 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 159 (1933).

<sup>13</sup> Baker v. I.A.C., 243 A.C.A. 424, 52 Cal. Rptr. 276, 31 C.C.C. 228 (1966). Asthma caused by the wheat allergy ultimately developed into disabling pulmonary emphysema. The case was tried under LAB. CODE § 5500.5 which relates exclusively to occupational diseases.

<sup>14</sup> Blanchard v. I.A.C., 68 Cal. App. 65, 228 Pac. 359, 11 I.A.C. 245 (1924).

<sup>15</sup> Moore Shipbuilding Corp. v. I.A.C., 70 Cal. App. 495, 233 Pac. 392, 12 I.A.C. 283 (1925).

<sup>16</sup> United States Cas. Co. v. I.A.C., 122 Cal. App. 2d 427, 265 P.2d 35, 19 C.C.C. 8 (1954).

<sup>17</sup> Johnson v. I.A.C., 157 Cal. App. 2d 838, 321 P.2d 856, 23 C.C.C. 54 (1958).

<sup>18</sup> Turudich v. I.A.C., 237 Cal. App. 2d 455, 47 Cal. Rptr. 21, 30 C.C.C. 316 (1965).

<sup>19</sup> Effective January 15, 1966, the judicial function of the Industrial Accident Commission became vested in the Workmen's Compensation Appeals Board, CAL. LAB. CODE § 111.

<sup>20</sup> Hofer v. I.A.C., 4 C.C.C. 32 (1939); Pacific Emp. Ins. Co. v. I.A.C., 13 C.C.C. 197 (1948); see note 36 *infra* for discussion of effect of denial of a writ of review.

<sup>21</sup> California Cas. Ind. Exch. v. I.A.C., 31 C.C.C. 135 (1966).

<sup>22</sup> Hess v. Cooperative Battery Co., 15 I.A.C. 19 (1928); Pacific Beter Works v. I.A.C., 5 C.C.C. 192 (1940).

<sup>23</sup> A progressive disease of the central nervous system found in this case to result from exposure to chemicals used by a dyer. Van Dusen v. Standard Dyers & Finishers, Inc., 6 C.C.C. 66 (1941).

<sup>24</sup> Pacific Emp. Ins. Co. v. I.A.C., 5 C.C.C. 188 (1940), where it was caused by exposure to solvents used by a painter. *Quaere*: If the offending agent is not peculiar

cellosis,<sup>25</sup> giant emphysematous bullae,<sup>26</sup> berylliosis<sup>27</sup> and hearing loss<sup>28</sup> as occupational diseases. An early case even held a policeman's flat feet, which developed over a five-year period, to be an occupational disease since his employment especially exposed him to the danger of such injury.<sup>29</sup> Wood alcohol poisoning,<sup>30</sup> ulcers<sup>31</sup> and ruptured intervertebral discs<sup>32</sup> have been determined not to be occupational diseases.

The Industrial Accident Commission has vacillated on the question of whether tuberculosis is an occupational disease. It initially held that since tuberculosis was due to an infection at a specific time, it was more analogous to an accident than an occupational disease "which appears as the result of accumulated exposure."<sup>33</sup> In *Layden v. Industrial Indemnity Company*,<sup>34</sup> however, a panel of three commissioners held tuberculosis resulting from an exposure to a fellow employee over a period of four years to be an occupational disease. Relying on some pre 1917 cases which confused the terms "occupational disease" and "disease arising out of the employment,"<sup>35</sup> they concluded that an occupational disease did not have to be peculiar to the occupation in which the injured workman was employed. For reasons which do not appear in the official reports, the *Layden* case was not appealed.<sup>36</sup> Most recently, the Commission returned to the

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to the occupation, should dermatitis be treated as an occupational disease? As a general rule, each outbreak of dermatitis is treated as a separate injury and the employer during the period of treatment required to clear up the outbreak. *Cerelli v. State Comp. Ins. Fund*, 17 I.A.C. 18 (1930). No permanent disability is found unless the employment, as opposed to a personal idiosyncrasy, caused the sensitivity. *Richie v. I.A.C.*, 22 C.C.C. 80 (1957).

<sup>25</sup> *Brown v. Cudahy Packing Co.*, 5 C.C.C. 197 (1940).

<sup>26</sup> *Union Lumber Co. v. I.A.C.*, 16 C.C.C. 255 (1951), where it was contracted by a saw mill worker as the result of exposure to dust coupled with strenuous physical labor.

<sup>27</sup> *Pacific Emp. Ins. Co. v. I.A.C.*, 15 C.C.C. 281 (1950), where the employee was a neon tube bender and worked with beryllium.

<sup>28</sup> *Halyaman v. Calif. Cas. Ind. Exch.*, 24 C.C.C. 232 (1959); *Messner v. I.A.C.*, 27 C.C.C. 226 (1962); *Kaiser Steel Corp. v. I.A.C.*, 28 C.C.C. 175 (1963); *Argonaut Ins. Co. v. I.A.C.*, 29 C.C.C. 390 (1964).

<sup>29</sup> *Hedden v. State Comp. Ins. Fund*, 5 I.A.C. 1 (1918).

<sup>30</sup> *De Witt v. Jacoby Bros.*, 1 I.A.C. 170 (1914), where the commissioners relied upon the fact that wood alcohol poisoning was not on a list of 20 or 25 generally recognized occupational diseases.

<sup>31</sup> *Pedrotti v. I.A.C.*, 30 C.C.C. 305 (1965).

<sup>32</sup> *White v. I.A.C.*, 16 C.C.C. 207 (1951); *Jenkins v. I.A.C.*, 29 C.C.C. 126 (1964), where the disc injury was the result of repeated jarring of a bus driver.

<sup>33</sup> *Asdel v. County of Los Angeles*, 4 C.C.C. 161 (1939).

<sup>34</sup> 25 C.C.C. 40 (1959).

<sup>35</sup> *E.g.*, *Adams v. California*, 4 I.A.C. 62 (1917).

<sup>36</sup> Judicial review of decisions of the Workmen's Compensation Appeals Board (formerly Industrial Accident Commission) is effected by means of a writ of review. Since this is a prerogative writ, the court has discretion to deny it without a hearing or opinion and the parties have no way of knowing the reason for the denial. It is generally considered, however, that a case in which a writ has been denied is somewhat

position that an occupational disease must be incurred in an industry or occupational situation which is productive of an uncommon amount of the disease or which routinely constitutes a special hazard.<sup>37</sup>

Dorland's Medical Dictionary defines occupational disease simply as a disease caused by one's employment.<sup>38</sup> It is perhaps regrettable that the Commission did not persist in its use of this simple definition. Adoption of such a definition, however, would require either legislative action or the ignoring of a substantial body of judicial authority, since the courts have rather consistently assumed that occupational diseases have certain distinguishing characteristics. Among them are: (1) gradual development although the rate of progress may vary<sup>39</sup>; (2) usually a continual absorption of deleterious substances<sup>40</sup>; (3) continuous exposure to a particular work situation finally causing physical breakdown<sup>41</sup>; (4) disease not previously existing but building up over a period of time<sup>42</sup>; (5) natural and reasonably to be expected results of following a particular occupation for a considerable period of time<sup>43</sup>; (6) first and early stages not always perceptible<sup>44</sup>; (7) peculiarity to a given occupation<sup>45</sup>; (8) latency and progressive development.<sup>46</sup>

One authority in the field of workmen's compensation has indicated that it is probably misleading to quote indiscriminately from the old decisions, but he notes that one common element running through all the definitions is a distinctive relation to the nature of the employment. Larson suggests that occupational disease should be defined to include any disease arising out of exposure to harmful employment conditions which are present in a peculiar or increased

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better authority than a referee or board decision from which no review was sought. Cf. *Messner v. I.A.C.*, 216 Cal. App. 2d 536, 30 Cal. Rptr. 898, 28 C.C.C. 115 (1963), where the court said that "denial without opinion of an application for a prerogative writ (except *habeas corpus*) is not *res judicata* of the issues presented by the application unless the sole possible ground of denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits." The referee's decision in the Layden case was extensively quoted, but without particular application, in *Argonaut Ins. Co. v. I.A.C.*, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628, 29 C.C.C. 279 (1964).

<sup>37</sup> *Pedrotti v. I.A.C.*, 30 C.C.C. 305 (1965).

<sup>38</sup> DORLAND, ILLUSTRATED MEDICAL DICTIONARY (23d ed. 1957).

<sup>39</sup> *Marsh v. I.A.C.*, 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 159 (1933).

<sup>40</sup> *Argonaut Mining Co. v. I.A.C.*, 21 Cal. App. 2d 492, 70 P.2d 216, 2 C.C.C. 130 (1937).

<sup>41</sup> *Argonaut Ins. Co. v. I.A.C.*, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628, 29 C.C.C. 279 (1964).

<sup>42</sup> *Colonial Ins. Co. v. I.A.C.*, 29 Cal. 2d 79, 172 P.2d 884, 11 C.C.C. 226 (1945).

<sup>43</sup> *San Francisco v. I.A.C.*, 183 Cal. 273, 191 Pac. 26, 7 I.A.C. 108 (1920).

<sup>44</sup> *Marsh v. I.A.C.*, 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 59 (1933).

<sup>45</sup> *Johnson v. I.A.C.*, 157 Cal. App. 2d 838, 321 P.2d 856, 23 C.C.C. 54 (1958).

<sup>46</sup> *Marsh v. I.A.C.*, 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 59 (1933).

degree not present in other occupations or every day life. He observes that length of exposure is gradually being disregarded as an essential element of an occupational disease.<sup>47</sup> While Larson's definition would probably not square with the language in some of the California decisions, its application to the various fact situations presented by the cases would not affect the ultimate results.

Radiation sickness, which has been a matter of much public concern in recent years, would undoubtedly be considered to be an occupational disease unless the exposure is patent and consists of a single episode. California authority on the subject is sparse.<sup>48</sup>

### OTHER DISEASES ARISING OUT OF EMPLOYMENT

Diseases other than occupational diseases are said to arise out of the employment when they result from some unusual condition of the employment. Compensation is not payable, however, merely because the disease is contracted during the employment. There must be a cause and effect relationship between the employment and the disease. The employee's risk of contracting the disease must, because of his employment, be materially greater than that of the general public.<sup>49</sup>

This risk may be the risk of exposure to a contagious disease carried by a pupil of a school teacher,<sup>50</sup> a patient of a hospital employee<sup>51</sup> or even a fellow employee in any industry.<sup>52</sup> Sometimes the increased exposure is the result of conditions of the employment such as poison oak,<sup>53</sup> drafts,<sup>54</sup> impure drinking water<sup>55</sup> or ring worm on

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<sup>47</sup> 1 LARSON, WORKMEN'S COMPENSATION 593 (1961).

<sup>48</sup> See, e.g., *Michel v. I.A.C.*, 22 C.C.C. 72 (1957). For an exhaustive treatment of one phase of the problem see Estep and Allen, *Radiation Injuries and Time Limitations in Workmen's Compensation Cases*, 62 MICH. L. REV. 259 (1963).

<sup>49</sup> *Bethlehem Steel Co. v. I.A.C.*, 21 Cal. 2d 742, 135 P.2d 153, 8 C.C.C. 61 (1943), and cases cited. In the case of certain public safety officials there are statutory rebuttable presumptions that certain diseases (hernia, pneumonia, tuberculosis and heart trouble) manifesting themselves while the official is in service arise out of the employment. CAL. LAB. CODE §§ 3212-3212.7.

<sup>50</sup> *San Francisco v. Connolly*, 20 I.A.C. 31 (1934).

<sup>51</sup> *Argonaut Ins. Co. v. I.A.C.*, 25 C.C.C. 65 (1960), where a nurse contracted infectious hepatitis; *San Francisco v. I.A.C.*, 183 Cal. 273, 191 Pac. 26, 7 I.A.C. 108 (1920), where an attendant contracted influenza; *Engels Copper Mining Co. v. I.A.C.*, 183 Cal. 714, 192 Pac. 845, 7 I.A.C. 144 (1920).

<sup>52</sup> *State Comp. Ins. Fund v. I.A.C.*, 22 C.C.C. 189 (1957).

<sup>53</sup> *Mandlebaum v. San Francisco*, 9 I.A.C. 122 (1922); see also *Adzima v. Maryland Cas. Co.*, 18 I.A.C. 79 (1932), where a sheepherder was bitten by ticks and came down with spotted fever.

<sup>54</sup> *Terry v. State Comp. Ins. Fund*, 11 I.A.C. 136 (1924), where exposure to drafts caused Bell's palsy in the case of a Y.M.C.A. hostess.

<sup>55</sup> *Pacific Ind. Co. v. I.A.C.*, 6 C.C.C. 36 (1941); paratyphoid fever; *Federal Mut. Liab. Ins. Co. v. I.A.C.*, 16 I.A.C. 48 (1929), typhoid fever.

the floor of a gentlemen's club.<sup>56</sup> Other times the special exposure results when the employee is sent to an area where there is an epidemic or endemic disease to which he has no resistance, such as malaria, San Joaquin Valley fever or dysentery.<sup>57</sup> The epidemic may even be in the employer's plant.<sup>58</sup> If illness results from a vaccination or inoculation requested by the employer, the illness arises out of the employment.<sup>59</sup>

#### AGGRAVATION OF PRE-EXISTING DISEASE BY EMPLOYMENT CONDITIONS

The maxim that "Industry takes the employee as he is at the time of his employment" is applied to hold the employer liable for industrially caused aggravation of an employee's pre-existing disease. Such an aggravation or acceleration of the pre-existing disease is considered an injury arising out of the employment.<sup>60</sup>

A disease, however, which under normal working conditions is likely to progress so as finally to disable the employee does not become an injury merely because it reaches the point of disability while the employee is working. It is only when there is a direct causal connection between the conditions of the employment and the disability that an award of compensation can be made.<sup>61</sup> In each case it must be determined whether the disability resulted exclusively from the diseased condition or whether the employment was a proximate cause. If the proximate and immediate cause of the disability is the underlying disease, there is no recovery, even though the disability manifests itself in the course of the employment.<sup>62</sup> If, on the

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<sup>56</sup> *Barnett v. London Guar. & Acc. Co.*, 19 I.A.C. 71 (1933); see also *Lutjens v. Fid. & Cas. Co.*, 13 I.A.C. 75 (1926), where a butcher tasted sausage infected with trichinae and *Williams v. Pac. Emp. Ins. Co.*, 4 C.C.C. 123 (1939) where the employee contracted impetigo from a telephone infected by a customer.

<sup>57</sup> *Hoback v. State Comp. Ins. Fund*, 5 C.C.C. 104 (1940), malaria by pipe layer in South American jungle; *Biscailuz v. County of Los Angeles*, 11 I.A.C. 121 (1924), tropical fever by a special deputy sent to Central America to bring back the notorious murderess, Clara Phillips; *Pacific Emp. Ins. Co. v. I.A.C.*, 19 Cal. 2d 622, 122 P.2d 570, 7 C.C.C. 71 (1942), valley fever; *Levine v. Los Angeles Examiner*, 13 I.A.C. 123 (1926), dysentery by a reporter sent to interior of Central America; *Fidelity & Cas. Co. v. I.A.C.*, 84 Cal. App. 506, 258 Pac. 698, 14 I.A.C. 228 (1927), typhoid while traveling in a foreign country; but see *Pattiani v. I.A.C.*, 199 Cal. 596, 250 Pac. 864, 13 I.A.C. 219 (1926), where it was held that the risk of contracting typhoid fever from eating oysters in New York City was not greater than that of the general public.

<sup>58</sup> *Bethlehem Steel Co. v. I.A.C.*, 21 Cal. 2d 742, 135 P.2d 153, 8 C.C.C. 61 (1943).

<sup>59</sup> *Roberts v. U.S.O. Camp Shows, Inc.*, 91 Cal. App. 2d 884, 205 P.2d 1116, 14 C.C.C. 136 (1949).

<sup>60</sup> *Beveridge v. I.A.C.*, 175 Cal. App. 2d 592, 346 P.2d 545, 24 C.C.C. 274 (1959).

<sup>61</sup> *California Cas. Ind. Exch. v. I.A.C.*, 76 Cal. App. 2d 836, 174 P.2d 680, 11 C.C.C. 268 (1946).

<sup>62</sup> *Ibid.*



other hand, the disability is due entirely to the lighting up or aggravation of the pre-existing condition by the employment, the employer is required to compensate the employee for the entire disability.<sup>63</sup>

The leading case illustrating this type of injury is *Fireman's Fund Indemnity Company v. Industrial Accident Commission*<sup>64</sup> where a representative of an employers' association suffered a stroke as a result of the strain and tension of 65 days of contract negotiations with certain labor unions. The medical testimony, although conflicting, established that the long hours of work and the tense conditions which surrounded them aggravated his pre-existing hypertension and precipitated a stroke. The award was based upon the rule that where an employee suffers disability brought on by strain and overexertion incident to his employment, there is a compensable injury even though the underlying disease previously existed and there is no traumatic injury.<sup>65</sup>

The same rule has been applied in a case of tuberculosis reactivated by weather and pressure changes and strenuous employment activity,<sup>66</sup> and aggravation of a pre-existing heart condition into disability as the result of dumping 150 heavy sacks of peanuts every day, six days a week.<sup>67</sup>

A chronic disease now more prevalent than lung cancer and tuberculosis combined is pulmonary emphysema, an insidious and progressive lung disease of unknown etiology. Second only to heart disease as a cause of disability in workers from 50 to 64 years of age, it is subject to aggravation by exposure to respiratory irritants. When such irritants are inhaled because of employment conditions, any resulting disability is compensable to the extent of the aggravation.<sup>68</sup>

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<sup>63</sup> Tanenbaum v. I.A.C., 4 Cal. 2d 615, 52 P.2d 215, 20 I.A.C. 390 (1935).

<sup>64</sup> 39 Cal. 2d 831, 250 P.2d 148, 17 C.C.C. 289 (1952).

<sup>65</sup> Lumbermen's Mut. Cas. Co. v. I.A.C., 29 Cal. 2d 492, 496, 175 P.2d 823, 11 C.C.C. 289 (1946).

<sup>66</sup> Pacific Ind. Co. v. I.A.C., 34 Cal. 2d 726, 214 P.2d 530, 15 C.C.C. 37 (1950).

<sup>67</sup> Liberty Mut. Ins. Co. v. I.A.C., 73 Cal. App. 2d 555, 166 P.2d 908, 11 C.C.C. 66 (1946), which contains an excellent analysis of all of the heart cases decided prior to 1946. Heart claims are almost always contested and are the subject of much controversy among labor, industry, insurance, legislative, medical and legal groups. There is no sound legal reason, however, why the heart should be treated any differently than any other organ impaired by an industrial injury. Volumes of material have already been written on the subject, and it will not be given any special treatment here. See Beard, *Heart Disease Claims under the California Workmen's Compensation Act*, 13 CIRCULATION 448 (1956), and Larson, *The Heart Cases in Workmen's Compensation*, 65 MICH. L. REV. 441 (1967).

<sup>68</sup> Johnson, *Emphysema and Employment*, ABA SEC. INS., NEG. & COMP. LAW, § 132 (1965). United States Lime Products v. I.A.C., 29 C.C.C. 253 (1964); Masonite Corp. v. I.A.C., 30 C.C.C. 88 (1965).

There is a familial tendency to emphysema and a statistical correlation between the disease and cigarette smoking. It may develop from allergic asthma.<sup>69</sup> If the allergic asthma is an occupational disease, the resulting emphysema should probably be treated as a proximate result of the occupational disease.<sup>70</sup>

#### AGGRAVATION OF DISEASE BY SPECIFIC INCIDENTS OF TRAUMA

The rule that the employer takes the employee subject to his condition when he enters the employment also applies where a specific traumatic episode lights up or aggravates a previously existing disease rendering it disabling. Again, liability for the full disability is imposed upon the employer even though the incident would have had little or no effect on a more healthy individual. Examples of this type of disease are reactivation of latent tuberculosis by an employment connected assault,<sup>71</sup> the lighting up of a latent leucic condition by an injury,<sup>72</sup> a myocardial infarction resulting from lifting a 12 foot roll of linoleum,<sup>73</sup> the fracture by a lifting strain of a hip so weakened by Paget's disease that a spontaneous fracture could be expected at any time,<sup>74</sup> and the aggravation of a schizoid personality into moderate schizophrenia by an injury which caused the loss of an eye.<sup>75</sup>

#### DISEASE AS A PROXIMATE RESULT OF TRAUMATIC INJURY

Frequently a traumatic injury will be complicated by a disease process which did not previously exist. If the disease which develops subsequent to the injury is a proximate result thereof, it is obviously compensable since the employer is liable for all disability and medical treatment proximately resulting from an industrial injury. Lock-

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<sup>69</sup> Testimony of Glen Lillington, M.D. in *Patterson v. Fireman's Fund Ins. Co.*, Case No. 65 SJ 16496 (1967). See also, ABA, SECTION ON INSURANCE, NEGLIGENCE AND COMPENSATION LAW 132 (1965).

<sup>70</sup> See note 13 *supra*.

<sup>71</sup> *Mullane v. I.A.C.*, 118 C.A. 283, 5 P.2d 483, 17 I.A.C. 328 (1931).

<sup>72</sup> *Los Angeles v. I.A.C.*, 20 I.A.C. 102 (1934).

<sup>73</sup> *Casualty Ins. Co. v. I.A.C.*, 23 C.C.C. 185 (1958); see note 67, *supra*.

<sup>74</sup> *State Comp. Ins. Fund v. Roberts*, 8 C.C.C. 117 (1942).

<sup>75</sup> *Subsequent Injuries Fund v. I.A.C.*, 53 Cal. 2d 392, 348 P.2d 193, 25 C.C.C. 10 (1960). Mental and emotional diseases arising out of the employment are as compensable as physical diseases. And exhaustive exploration of this type of disease is beyond the scope of the article, but, in general, the same rules apply. Difficulty, however, arises when the language of the physical injury decisions is used loosely in cases involving psychoneuroses. Here lawyers and psychiatrists often fail to differentiate the situation where an injury actually aggravates or precipitates a neurosis from that where the injury merely provides a convenient focus for existing anxieties. Cf. *Tolerico v. I.A.C.*, 24 C.C.C. 264 (1959); *Pineda v. I.A.C.*, 30 C.C.C. 74 (1965); *Cooper v. I.A.C.*, 30 C.C.C. 128 (1965).

jaw from stepping on a rusty nail,<sup>76</sup> gonorrheal infection<sup>77</sup> or shingles<sup>78</sup> entering the system through an eye abrasion and mental deterioration from a blow on the head<sup>79</sup> are examples of this type of disease. The injury may also cause such a lowered resistance to infection that a subsequent infection is considered a proximate result of the injury.<sup>80</sup>

### INJURIES CAUSED BY DISEASE

As mentioned above, a purely idiopathic illness which has no relation to the employment does not constitute an industrial injury even though it occurs in the course of the employment. In the early history of workmen's compensation in California, the Supreme Court applied this rule to the case of a workman who had an epileptic fit and fell 39 feet to the ground from a scaffold sustaining fatal injuries.<sup>81</sup> In later cases this harsh holding was modified, and it was decided that if some factor peculiar to the employment contributed to the injury, it arose out of the employment even though it had its origin solely in some idiopathy of the employee. Thus, it was held in *National Automobile & Casualty Insurance Company v. Industrial Accident Commission*<sup>82</sup> that a skull fracture suffered by an electrician during an epileptic seizure which caused him to strike his head against a saw horse was compensable. The saw horse was considered a special risk of the employment which contributed to the injury. Finally, in *Employers Mutual Liability Insurance Company of Wisconsin v. Industrial Accident Commission*,<sup>83</sup> the Supreme Court rejected the argument that it was necessary in idiopathic seizure cases for the fall to be from a height or against some object to establish a causal relationship between the employment and the injury.<sup>84</sup> Justice Carter, writing for a bare majority, pointed out that the causal connection between the employment and injury need only be contributory and that he could see no distinction between the idiopathic seizure cases and those in which an employee fell because of his own carelessness or innate awkwardness.

Although epileptic seizure cases are perhaps the most dramatic, the rules announced therein are equally applicable to the case of a truck driver who has a fainting spell and is injured when his truck

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<sup>76</sup> *Pacific Gas & Elec. Co. v. I.A.C.*, 17 I.A.C. 147 (1930).

<sup>77</sup> *Kelly v. State Comp. Ins. Fund*, 19 I.A.C. 55 (1933).

<sup>78</sup> *Guarantee Ins. Co. v. I.A.C.*, 20 C.C.C. 189 (1955).

<sup>79</sup> *Pacific Ind. Ins. Co. v. I.A.C.*, 23 C.C.C. 130 (1958). See note 75, *supra*.

<sup>80</sup> *Royal Ind. Co. v. I.A.C.*, 16 C.C.C. 3 (1951).

<sup>81</sup> *Brooker v. I.A.C.*, 176 Cal. 275, 168 Pac. 126, 4 I.A.C. 311 (1917).

<sup>82</sup> 75 Cal. App. 2d 677, 171 P.2d 594, 11 C.C.C. 206 (1946).

<sup>83</sup> 41 Cal. 2d 676, 263 P.2d 4, 18 C.C.C. 286 (1953).

<sup>84</sup> See 5 HASTINGS L.J. 266 (1954).

goes off the road, or to the case of a telephone repairman who has a heart attack on top of a pole and falls off sustaining fatal injuries.<sup>85</sup>

### CUMULATIVE INJURIES

Although they are beyond the scope of this article, some mention should be made of the "continuous cumulative" or "repetitive trauma" injuries, as it is frequently difficult to distinguish them from occupational diseases and aggravation of pre-existing diseases. This type of injury has long been recognized in California,<sup>86</sup> but experienced a renaissance in *Beveridge v. Industrial Accident Commission*.<sup>87</sup> In these cases the cumulative effect of a succession of slight or microtraumatic injuries, which individually are not disabling, ultimately results in disability. Thus, a car loader may, as a result of constant bending and heavy lifting over a period of years, cause the breakdown of an intervertebral disc, or a cabinet maker may develop an elbow inflammation from repetitive sanding. Justice Tobriner eloquently described the process as follows:

We think the proposition irrefutable that while a succession of slight injuries in the course of employment may not in themselves be disabling, their cumulative effect in work effort may become a destructive force. The fact that a single but slight work strain may not be disabling does not destroy its causative effect, if in combination with other such strains, it produces a subsequent disability. The single strand, entwined with others, makes up the rope of causation.<sup>88</sup>

One California authority has observed that repetitive injuries can only be distinguished from occupational diseases by the type of pathology involved.<sup>89</sup> Such a distinction provides the only reasonable way of explaining why a hearing loss resulting from the repetitive trauma of sound waves beating on the ear drums is an occupational disease<sup>90</sup> while a ruptured disc resulting from constant and repetitive jarring of the spine is not.<sup>91</sup>

### DATE OF INJURY

When the injury consists of or flows from a specific traumatic episode, the date of the incident is the date of injury. When dealing

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<sup>85</sup> *Pacific Tel. and Tel. Co. v. I.A.C.*, 19 I.A.C. 106 (1933).

<sup>86</sup> *E.g.*, *Searle v. Bay Cities Transp. Co.*, 20 I.A.C. 42 (1934); *Grigsby v. State Comp. Ins. Fund*, 7 I.A.C. 187 (1920), where the Commission likened a hernia resulting from continual heavy lifting to an occupational disease.

<sup>87</sup> 175 Cal. App. 2d 592, 346 P.2d 545, 24 C.C.C. 274 (1959).

<sup>88</sup> *Id.* at 594, 346 P.2d at 547, 24 C.C.C. at 276.

<sup>89</sup> 2 HANNA, *EMPLOYEE INJURIES & WORKMEN'S COMPENSATION* 134 (1954).

<sup>90</sup> See note 28 *supra*.

<sup>91</sup> See note 19 *supra*.

with occupational diseases, contagious diseases with delayed periods of incubation, aggravation of pre-existing disease by employment conditions and cumulative injuries, no specific date can be readily fixed as the date of injury.<sup>92</sup> Ascertainment of the date of injury can be critical in a given case since it affects the time within which the action must be filed, the amount and nature of the compensation payable and the jurisdiction of the Workmen's Compensation Appeals Board.<sup>93</sup>

The law in force at the time of injury is applied to determine the measure of recovery.<sup>94</sup> If an employee sustains a traumatic injury on a certain date, he is entitled to compensation at the rate provided by the law in effect on that date, but a problem arises in disease cases when a change in the law becomes effective between the date of exposure and the date of disability.<sup>95</sup> Temporary disability indemnity is payable only during the five years immediately following the injury,<sup>96</sup> and the Workmen's Compensation Appeals Board loses jurisdiction to amend, alter or rescind its awards if a petition for such relief is not filed within five years from the date of injury.<sup>97</sup>

California courts initially considered that regardless of date of exposure to a disease, the employee had no cause of action and no rights accrued to him until that point in time when the disease resulted in a compensable disability. In *Marsh v. Industrial Accident Commission*<sup>98</sup> the Supreme Court announced that the date of injury should be deemed to be

... the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in the performance of the duties of the employment.<sup>99</sup>

Following this decision, it was generally considered that the date of injury in all cases was the date on which disability and knowledge that the disability was caused by the employment coincided.

In 1947 the following sections were added to the Labor Code:

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<sup>92</sup> Association Ind. Corp. v. I.A.C., 124 Cal. App. 378, 12 P.2d 1075, 18 I.A.C. 203 (1932).

<sup>93</sup> See note 19 *supra*.

<sup>94</sup> Aetna Cas. & Surety Co. v. I.A.C., 30 Cal. 2d 388, 182 P.2d 159, 12 C.C.C. 123 (1947).

<sup>95</sup> Association Ind. Co. v. I.A.C., 9 C.C.C. 244 (1944), which was decided prior to the adoption of LAB. CODE §§ 5411-12.

<sup>96</sup> CAL. LAB. CODE § 4656.

<sup>97</sup> CAL. LAB. CODE § 5804.

<sup>98</sup> 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 159 (1933).

<sup>99</sup> *Id.* at 351, 18 P.2d at 938, 19 I.A.C. at —.

5411. The date of injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed.

5412. The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment.

Since 1947, therefore, the date of injury in occupational disease cases has been different from the date of injury in other disease cases. In the latter cases, the date of injury is the last date of exposure, whether the exposure be to a contagious disease<sup>100</sup> or employment strains.<sup>101</sup> Concern has been expressed that application of Section 5411 to disease and repetitive trauma cases may result in the loss of a right before it accrues if the disability does not manifest itself until more than a year after the last exposure.<sup>102</sup> It was apparently this fear which motivated the Industrial Accident Commission to attempt to broaden the definition of occupational disease in the case of *Layden v. Industrial Indemnity Co.*<sup>103</sup> which was discussed above. In most cases, however, the last exposure and the first disability are sufficiently contemporaneous that no serious problem arises.<sup>104</sup>

Establishment of the date of injury in occupational disease cases involves the factual issue of knowledge of the employee that his disability is employment connected, and the legal issue of what constitutes "disability." A problem frequently arises in hearing loss cases where an employee in a noisy work environment becomes aware of a progressive hearing loss which he suspects is being caused by the noise of the employment. If his hearing were to be tested, his hearing loss might be sufficient to entitle him to a permanent disability rating,<sup>105</sup> but he is able to continue working without impair-

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<sup>100</sup> *Johnson v. I.A.C.*, 157 Cal. App. 2d 838, 321 P.2d 856, 23 C.C.C. 54 (1958).

<sup>101</sup> *Fireman's Fund Ind. Co. v. I.A.C.*, 39 Cal. 2d 831, 250 P.2d 148, 17 C.C.C. 289 (1952).

<sup>102</sup> CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 129 (1963). The Statute of Limitations for filing an application for hearing before the Workmen's Compensation Appeals Board is one year if no benefits have been furnished. CAL. LAB. CODE § 5405.

<sup>103</sup> 25 C.C.C. 40 (1960).

<sup>104</sup> *State Comp. Ins. Fund v. I.A.C.*, 20 C.C.C. 184 (1964); *Argonaut Ins. Co. v. I.A.C.*, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628, 29 C.C.C. 279 (1964) which contain dicta, contrary to the clear wording of CAL. LAB. CODE § 5411, to the effect that the date of injury in repetitive trauma cases is the first date of disability. In each case, however, the last exposure immediately preceded the first day of disability.

<sup>105</sup> CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 535 (1963). A scheduled permanent disability for rating purposes may be different from the actual disability insofar as productive work is concerned. *Smith v. I.A.C.*, 44 Cal. 2d 364, 282 P.2d 64, 20 C.C.C. 82 (1955).

ment of function or loss in wages. In this situation the Industrial Accident Commission has defined disability as either an actual loss in earning power or a limitation on the performance of his duties<sup>106</sup> or as an actual "incapacity to pursue his regular job."<sup>107</sup>

It would seem that the foregoing definitions applied to a case in which the employee knows he has had a sufficient industrial hearing loss to qualify for permanent disability indemnity for longer than one year would go beyond the language of *Marsh v. Industrial Accident Commission*<sup>108</sup> since the employee would have sustained a "compensable injury" when he first became entitled to permanent disability indemnity.<sup>109</sup> The answer may be that because the hearing loss is progressive, the injury does not become "permanent and stationary" until the exposure ceases.<sup>110</sup>

It is interesting to observe that the word "disability" as used in Labor Code sections 4751 and 4658 has been held not to require an actual loss of earnings.<sup>111</sup> The Commission, moreover, has taken the position that, for the purpose of Section 4751, disability includes prospective loss of earning power and does not necessarily require actual work disability or loss of earnings.<sup>112</sup> The seeming inconsistency can be explained by the requirement in each case that the sections involved be "liberally construed . . . with the purpose of extending their benefits for the protection of persons injured . . ."<sup>113</sup>

#### APPORTIONMENT

Although, as has been seen above, the employer incurs liability whenever the employment causes or aggravates a disease, it does not necessarily follow that an employee's entire disability is the responsibility of the employer. Labor Code Section 4663 provides that compensation shall be allowed only for such portion of disability

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<sup>106</sup> *Argonaut Ins. Co. v. I.A.C.*, 29 C.C.C. 390 (1964).

<sup>107</sup> *Kaiser Steel Corp. v. I.A.C.*, 28 C.C.C. 175 (1963).

<sup>108</sup> 217 Cal. 338, 18 P.2d 933, 19 I.A.C. 159 (1933).

<sup>109</sup> At the time the *Marsh* case was decided, CAL. LAB. CODE § 4661 provided: "Where an injury causes both temporary and permanent disability, the injured employee is not entitled to both a temporary and permanent disability payment, but only to the greater of the two." Sec. 4661 now allows full compensation for both.

<sup>110</sup> Permanent disability indemnity is not ordinarily payable until the disability is stationary. CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 532-33 (1963). In any event, see *Williams v. I.A.C.*, 71 Cal. App. 2d 136, 161 P.2d 979, 10 C.C.C. 267, 271 (1945), where the court said that whether the Statute of Limitations starts running only when the impairment of earnings is of such a substantial character that a man of ordinary prudence would seek compensation was still an open question in this state.

<sup>111</sup> *Ferguson v. I.A.C.*, 50 Cal. 2d 469, 326 P.2d 145, 23 C.C.C. 108, 112 (1958); *State Comp. Ins. Fund v. I.A.C.*, 59 Cal. 2d 45, 27 Cal. Rptr. 702, 377 P.2d 902, 28 C.C.C. 20, 24 (1963).

<sup>112</sup> *Subsequent Injuries Fund v. I.A.C.*, 30 C.C.C. 258 (1965).

<sup>113</sup> CAL. LAB. CODE § 3202.

due to the aggravation of a prior disease as can be reasonably attributed to the injury. Labor Code Section 4750 provides that an employer is not liable for any permanent disability or physical impairment which existed before the injury. If, however, the employee's disability is due entirely to the lighting up or aggravation of a pre-existing condition by the industrial injury, the employer is required to compensate for the entire disability, and there can be no apportionment between the extent of the disability due to the injury itself and that due to the contribution of the pre-existing disease.<sup>114</sup> If, on the other hand, the resultant disability consists partly of disability growing out of the injury (including the lighting up or aggravation of pre-existing disease) and partly of disability resulting from the normal progress of a pre-existing disease apart from the effects of the injury, the Workmen's Compensation Appeals Board must make an apportionment.<sup>115</sup>

Application of these principles is well illustrated by the facts in the case of Mary M. Harris<sup>116</sup> who had suffered from tuberculosis of the spine since childhood. Although her spine had been fused and she had marked disability, she was able to obtain employment as a sales clerk with Goodwill Industries, a corporation employing physically handicapped persons. In the course of her employment she fell from a step-ladder and struck her right hip. The injury aggravated her pre-existing quiescent tuberculosis, and she became totally disabled. Since the temporary disability and the immediate need for medical treatment was the result of the fall and its aggravating effects on her pre-existing disease, the employer's insurance carrier was held liable for the entire amount.

When the healing period was over and the injury became permanent and stationary, she was left with permanent disability consisting of the following: (1) the pre-existing disability; (2) any disability resulting from normal progress of the disease apart from the effects of the injury; (3) the disability directly attributable to the fall, and (4) the disability caused by the injury's aggravation of the pre-existing disease. The employer's insurance carrier was not liable for the first<sup>117</sup> and second<sup>118</sup> disabilities, but was for the third and fourth.<sup>119</sup>

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<sup>114</sup> *Tanenbaum v. I.A.C.*, 4 Cal. 2d 615, 52 P.2d 215, 20 I.A.C. 390 (1935).

<sup>115</sup> *Bowler v. I.A.C.*, 135 Cal. App. 2d 534, 287 P.2d 562, 20 C.C.C. 217 (1955).

<sup>116</sup> *Goodwill Indus. v. I.A.C.*, 114 Cal. App. 2d 452, 250 P.2d 627, 17 C.C.C. 294 (1952); *Subsequent Injuries Fund v. I.A.C.*, 44 Cal. 2d 604, 283 P.2d 1039, 20 C.C.C. 114 (1955).

<sup>117</sup> CAL. LAB. CODE § 4750.

<sup>118</sup> CAL. LAB. CODE § 4663. In the actual Harris cases the extent of disability due to the normal pregression of the pre-existing disease, if any, was apparently overlooked. The subject is fully and accurately discussed in *Subsequent Injuries Fund v. I.A.C.*, 135 Cal. App. 2d 544, 288 P.2d 31, 20 C.C.C. 230 (1955) which is analogous.

<sup>119</sup> *Tanenbaum v. I.A.C.*, 4 Cal. 2d 615, 52 P.2d 215, 20 I.A.C. 390 (1935).



Where the employee dies as a result of his injury, there is no apportionment, and the employer is liable for the entire death benefit even though the pre-existing disease would eventually have been fatal.<sup>120</sup>

### LIABILITY OF PRIOR EMPLOYERS

Another facet of the apportionment problem in cases of occupational disease and progressive aggravation of pre-existing disease is allocating liability for compensation when the employee has worked for several employers during the period of exposure. As has been seen, a disease to be compensable must arise out of the employment, but this does not mean that a particular employment must be the sole proximate cause of the disease. As long as it substantially and proximately contributes to the disease, the employer may be held liable for the full disability attributable to the entire exposure.<sup>121</sup>

It is not uncommon for a miner or a construction worker to have worked for scores of different employers while developing an occupational disease. The procedure for handling this type of case was announced by the Supreme Court in *Colonial Insurance Company v. Industrial Accident Commission*<sup>122</sup> as follows:

We believe the more workable and fairer rule to be in progressive occupational diseases, that the employee may, at his option, obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability. To require an employee disabled with such a disease to fix upon each of the carriers or employers the precise portion of the disability attributable to its contribution to the cause of the malady is not in consonance with the required liberal interpretation and application of the workmen's compensation laws. The successive carriers or employers should properly have the burden of adjusting the share that each should bear and that should be done by them in an independent proceeding between themselves. They are in a better position to produce evidence on the subject and establish the proper apportionment. All of them may have contributed to the disability and the employee should be permitted to proceed against and have an award against any or all of them for the whole disability if the evidence discloses that he was exposed to silica dust during his period of employment with each of the employers named.<sup>123</sup>

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<sup>120</sup> *Pacific Gas & Elec. Co. v. I.A.C.*, 56 Cal. 2d 219, 14 Cal. Rptr. 548, 26 C.C.C. 130 (1961), where a non-industrial cancer was found to have been aggravated by a fall. The employee would have died of the cancer within a year if there had been no injury, but the employer was held liable for the entire death benefit.

<sup>121</sup> *Colonial Ins. Co. v. I.A.C.*, 29 Cal. 2d 79, 172 P.2d 884, 11 C.C.C. 226 (1946).

<sup>122</sup> 29 Cal. 2d 79, 172 P.2d 884, 11 C.C.C. 226 (1946).

<sup>123</sup> *Id.* at 82, 172 P.2d at 886, 11 C.C.C. at 227.

Since that case, an employee disabled as the result of an occupational disease has had the right to proceed against any one or more of his successive employers (or their insurance carriers) and obtain an award against any or all of them for the whole disability.<sup>124</sup> In 1951 Section 5500.5 of the Labor Code was enacted to codify the rule of the Colonial Insurance Company case<sup>125</sup> and to provide the details for the trial of occupational disease cases.

The decision in *Fireman's Fund Indemnity Co. v. Industrial Accident Commission*<sup>126</sup> specifically authorized the use of this procedure in cases where a pre-existing disease is aggravated by cumulative exposures, and it is used by analogy in repetitive injury cases.<sup>127</sup> In this connection, there is an important difference between occupational disease cases and those involving aggravation of a pre-existing disease. In the former, by definition, the disease did not exist before the industrial exposure;<sup>128</sup> the exposure is peculiar to the occupation,<sup>129</sup> and there is no problem of apportionment except among the successive employers or insurance carriers.<sup>130</sup> In the aggravation cases, however, it is possible that the disease was causing some disability prior to the injury, that it is progressing apart from the effects of the employment or that it is being aggravated by non-industrial factors. It is not necessarily true in this type of case that the employee can recover for his whole disability against any employer who contributed to the disability. The normal apportionment rules apply where the work aggravates a pre-existing disease.<sup>131</sup>

### A SOCIAL PROBLEM

The rules precluding apportionment in death cases and making the employer fully liable for the aggravation by injury of a pre-existing disease undoubtedly produce a socially desirable result in individual cases. Whether this is equally true of their long range effect is open to serious question.

The basic concept of workmen's compensation laws is to shift

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<sup>124</sup> *Globe Ind. Co. v. I.A.C.*, 125 Cal. App. 2d 763, 271 P.2d 149, 19 C.C.C. 132 (1954).

<sup>125</sup> *Colonial Ins. Co. v. I.A.C.*, 29 Cal. 2d 79, 172 P.2d 884, 11 C.C.C. 226 (1945).

<sup>126</sup> 39 Cal. 2d 831, 250 P.2d 148, 17 C.C.C. 289 (1952).

<sup>127</sup> *Argonaut Ins. Co. v. I.A.C.*, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628, 29 C.C.C. 279 (1964).

<sup>128</sup> *Colonial Ins. Co. v. I.A.C.*, 29 Cal. 2d 79, 172 P.2d 884, 11 C.C.C. 226 (1945).

<sup>129</sup> *Johnson v. I.A.C.*, 157 Cal. App. 2d 838, 321 P.2d 856, 23 C.C.C. 54 (1958).

<sup>130</sup> *Subsequent Injuries Fund v. I.A.C.*, 135 Cal. App. 2d 544, 288 P.2d 31, 20 C.C.C. 230, 233 (1955).

<sup>131</sup> *State Comp. Ins. Fund v. I.A.C.*, 56 Cal. 2d 681, 16 Cal. Rptr. 359, 26 C.C.C. 200 (1961).

the major portion of the burden of industrial diseases and injuries from the injured employees to industry and ultimately to the consumer as a part of the cost of the product or service.<sup>132</sup> The employer's share of this burden is a substantial business expense. The average workmen's compensation insurance premium cost in California probably exceeds \$1.75 per \$100 of payroll.<sup>133</sup> In the more hazardous industries the cost is substantially higher.<sup>134</sup> An employer with a low loss record and a safe operation, however, may reduce his compensation insurance costs by means of dividend plans, merit rating and experience rating.<sup>135</sup>

This possibility of reducing one cost of doing business provides an important incentive for the employer to conduct his operations in a manner calculated to minimize industrial injury,<sup>136</sup> but it also makes him reluctant to hire employees with diseases likely to be aggravated by injury or the occupational environment. Thus, people with heart ailments or degenerative intervertebral disc disease are frequently rejected in their search for employment,<sup>137</sup> and cost conscious employers are often somewhat less than enthusiastic about participating in "hire the handicapped" projects.

The obvious dilemma has been thoroughly debated and discussed, but a solution acceptable to both industry and labor has yet to be proposed.<sup>138</sup> Until adequate remedial legislation is enacted, the lawyer for an injured employee must be concerned not only with securing an adequate award of compensation but also with advising the client as to his vocational future.<sup>139</sup>

### CONCLUSION

In summary, the California workmen's compensation law provides general coverage for diseases arising out of the employment. An employer, or his insurance carrier, is liable for any disease caused or aggravated by the employment. He is not liable for pre-existing

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<sup>132</sup> CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 4 (1963).

<sup>133</sup> REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION 52 (April 1965).

<sup>134</sup> *Id.* at 47.

<sup>135</sup> CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 477 (1963).

<sup>136</sup> ABA, SECTION ON INSURANCE, NEGLIGENCE AND COMPENSATION LAW 132 (1965).

<sup>137</sup> REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION 227 (April 1965).

<sup>138</sup> *Id.* at 113-20.

<sup>139</sup> CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 34-36, 52-54 (1963), for an excellent discussion of how this responsibility can be discharged.

disability nor for disability resulting from the normal progression of a disease apart from the effects of the injury. In the case of an occupational disease or aggravation of a disease by extended exposure, the employee may recover for the entire industrial disability from any one or more successive employers or insurance carriers whose exposure contributed to the injury. The employers or insurance carriers so held may seek apportionment and contribution from the others in a supplemental proceeding.

The date of injury in occupational disease cases is the date on which actual or imputed knowledge of the cause of the disease coincides with disability. In other cases it is the date of the incident or exposure causing or aggravating the disease. If the exposure extends over a period of time, the last day of the exposure is the date of injury.

The practical lawyer will keep these basic principles and their various ramifications constantly in mind while preparing and trying an industrial injury case involving disease. The more academically inclined will look for clarification of the definitions of "disability" and "occupational disease" from the Supreme Court but will not anticipate any judicial modification of the basic rules.

The Legislature, on the other hand, will continue to be under constant pressure to limit the rule that industry takes the employee as it finds him. Statutory amendments authorizing employees with pre-existing diseases to execute waivers, providing for apportionment of liability on the basis of contributing causes, and establishing guidelines limiting liability in disease cases will be proposed by industry and opposed by labor.<sup>140</sup> The Legislature has thus far rejected numerous similar proposals, and it is doubtful that any major changes will be made in the near future unless they are a part of a major piece of legislation providing for the rehabilitation and re-employment of injured employees.

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<sup>140</sup> REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION 113-20 (April 1965).